



claimant was injured on the job and filed a workers compensation claim. Claimant contends respondent used the missed days for the doctor's appointment as a pretext to terminate his employment.

Respondent argues the ALJ's Order should be affirmed.

The issue on appeal is whether claimant was terminated for cause and whether he is entitled to TTD benefits.

#### **FINDINGS OF FACT**

Claimant worked for respondent for a little over a year and a half, when on September 12, 2013, he suffered injury to his back while lifting bags of concrete and performing concrete work. Claimant reported his injury to his supervisor, Tom Neiff. He also reported his injury to respondent's owner, David Rhodes, and was sent to Urgent Care for medical treatment. On September 26, 2013, at Urgent Care, claimant was provided with treatment for a back strain and it was suggested that he follow-up with an occupational medicine provider. Claimant was taken off work until he could see an occupational medicine provider. Claimant relayed this to Mr. Rhodes and was told to use his health insurance to pay for the visit as respondent was not going to pay. At this point, claimant took action to protect his rights and hired an attorney.

On October 10, 2013, claimant received a letter from Mr. Rhodes indicating he was being allowed to see a workers compensation physician. After seeing this physician, claimant was given work restrictions and allowed to return to light duty work on October 17, 2013. Claimant testified that when he returned to work several things had changed. His keys and garage door opener were taken away and he wasn't allowed to go into certain areas without a supervisor. Claimant testified it felt like no one wanted him around.

Claimant admitted to missing time from work unrelated to his injury, due to his status as a single parent. He testified that he had never been written up for time he missed due to his kids, but as soon as he started missing because of his injury, he began receiving warnings about excessive absences. Prior to October 2013, claimant had missed 39 days of work.

At the preliminary hearing, claimant disputed allegations contained in a letter from Mr. Rhodes, dated November 14, 2013, regarding his absence record with respondent. Claimant doesn't recall needing a doctor's note for absences. In the letter, Mr. Rhodes acknowledged claimant was being treated differently than other employees due to claimant having the worst absence record of any employee with respondent.

Claimant returned to work for respondent on October 17, 2013, with limitations which respondent was willing and able to accommodate. Respondent accommodated claimant's restrictions until the date of his termination.

On November 14, 2013, claimant was given a written warning due to his failure to provide a health care provider's statement justifying his absences, as was required in an October 10, 2013, letter from Mr. Rhodes. The November 14, 2013, letter from Mr. Rhodes informed claimant a statement from a health care provider continued to be required. Failure to do so could result in claimant's discharge from employment.

On December 6, 2013, claimant was scheduled for a therapy appointment. Claimant missed the appointment due to automobile trouble. Claimant's car had a preexisting transmission problem. For reasons not explained, claimant did not have any spare transmission fluid with him on that day. This caused claimant to miss the appointment. Claimant left work at about 1:15 p.m. but never made the appointment. The appointment was then rescheduled by claimant for the next Monday. Claimant was absent from work that morning to attend the therapy appointment. However, claimant had failed to accurately document the time of the appointment, which he had scheduled with the doctor's office. Claimant called respondent to advise he was going to miss work that morning due to the appointment. However, the appointment was actually scheduled for 2:15 p.m. This confusion caused claimant to miss 1½ days of work for a single therapy appointment.

Claimant continued on light duty until December 10, 2013, at which time his employment with respondent was terminated due to his attendance record. At the time of his termination, claimant's restrictions were to alternate sitting and standing every hour, and no lifting over 40 pounds. Claimant testified that the reason given for his termination was missing/rescheduling appointments and not properly notifying Mr. Rhodes.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2013 Supp. 44-510c(b)(2)(C) states:

If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

Determinations dealing with a claimant's entitlement to TTD are well within an ALJ's authority at a preliminary hearing. The Board's review of preliminary hearing orders, however, is limited. The Board can review only those issues listed in K.S.A. 44-534a(a)(2). Those issues are : (1) whether the employee suffered an accident, repetitive trauma or resulting injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given, or (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim under

the Workers Compensation Act.<sup>1</sup> The Board can also review preliminary decisions when a party alleges the ALJ exceeded his or her jurisdiction.<sup>2</sup>

The issue of whether a worker is entitled to TTD is not generally considered jurisdictional. A claimant's entitlement to TTD is fully within the authority granted to an ALJ.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>3</sup>

Since the review requested by claimant does not raise an issue of compensability enumerated in K.S.A. 2013 Supp. 44-534a(2), and there has been no showing the ALJ exceeded his authority, the application for Board review must be dismissed for lack of jurisdiction.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

After reviewing the record compiled to date, the undersigned Board Member concludes claimant's request for Board review of the January 29, 2014, preliminary hearing Order entered by the ALJ is hereby dismissed for lack of jurisdiction. The preliminary hearing Order remains in full force and effect.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated January 29,

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<sup>1</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>2</sup> K.S.A. 2013 Supp. 44-551(i)(2)(A).

<sup>3</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

<sup>4</sup> K.S.A. 2013 Supp. 44-534a.

2014, remains in full force and effect and claimant's appeal is dismissed for lack of jurisdiction.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2014.

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HONORABLE GARY M. KORTE  
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge